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Supreme Court of the United States

OCTOBER TERM, 1936

No. 459

SOPHIA BRENNAN, ADMINISTRATRIX, ET AL.,
Petitioner,

versus

SABINE TOWING COMPANY, INC., ET ALS.,
Respondent,

No. 460

CHARLES VAN BEECK, ADMINISTRATOR,
Petitioner,

versus

SABINE TOWING COMPANY, INC., ET ALS.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI IN CAUSES NUMBERED 459, and 460.

M. A. GRACE,
W. G. FEELY,
Proctors for Respondent.

EDWIN H. GRACE,
DANIEL H. GRACE,
MILTON C. GRACE,
Of Counsel.

HAUSER PRINTING CO., NEW ORLEANS

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals, Fifth Circuit, is found at R. 447-455, but not yet reported. The decree of the District Court is found at R. 396. The Commissioner's report and findings are to be found at R. 341-353. The trial Court's modification and adoption of the findings of the Commissioner as its findings is found at R. 391-396.

STATEMENT

In one petition petitioners herein are seeking writs of *certiorari* in causes Numbered 459 and 460. In cause Number 459 petitioners are complaining of, and seeking to have this Court review, the action of the United States Circuit Court of Appeals for the Fifth Circuit, on appeal in Admiralty, a trial *de novo*, in fixing the awards for damages herein in a sum below that arrived at in the District Court, to cover pecuniary damages sustained by petitioners, growing out of the death of seamen, and as allowed under Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. Section 688); and of the action of the Appellate Court in further modifying the final decree of the lower Court by providing that interest on damages should run from the date of the final decree in the District Court, instead of from date of the Commissioner's report herein, as allowed by the Commissioner and the District Court.

In cause Number 460 petitioner is complaining of the action of the two lower Courts in disallowing a claim for damages in the sum of Seven Hundred Dollars ($700.00), which the Commissioner allowed to the administrator of a death claimant who, after having instituted her suit, died before the question of liability was determined.

In this brief and under Part I, we will set out the ground on which this opposition to granting the writ in cause Number 459 is based, and in Part II, the grounds of opposition to granting the writ in cause Number 460.

PART I. CAUSE NUMBER 459

A.

In cause Number 459 of the docket of this Honorable Court, petitioners urge that the awards as determined

upon by the Court of Appeals are inadequate, and as grounds why this Court should grant the writ and pass upon said awards, say:

> " * * * to secure that uniformity of decisions among the lower courts with respect to amount of damages allowed seamen and their families under substantially the same or similar facts." (P. 25).

This, as stated by this Honorable Court and various lower Courts, cannot be done, because, as stated by this Court in the case of *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, "No hard and fast rule by which pecuniary damages may in all cases be measured is possible. * * *" This Court therein emphasized that each case must be determined by reference to "its immediate circumstances." The awards in the case at bar were determined upon after careful consideration of the evidence before the Court herein, all as shown by the well considered opinion of the Court of Appeals.

B.

Petitioners herein err in the statement, at page 17 of their petition, to the effect that all parties consented to the matter being referred to a Commissioner, and from that erroneous premise contend that the Court of Appeals should have, under the circumstances, given to the Commissioner's findings the weight to which they contend such findings were entitled, and urge that such action on the part of the Court of Appeals is in conflict with the decisions of this Honorable Court which are cited. By reference to the order appointing the Commissioner herein, which appears at R. 46, it will be noted that it is the usual order of reference made and entered in Admiralty cases, and entered on the sole motion of "said proctors for claimants", petitioners herein. It was in no sense a con-

sent reference to a Commissioner to ascertain the damages. The terms of the order clearly show that the Commissioner's report was to be advisory only, as the said order specifically provided that the Commissioner

> " * * * take further proof that may be offered as to the amount of damages sustained by every and all of the claimants herein **and to report thereon to this court with the evidence taken before him with respect to the various claims for death, and with his opinion in addition as respects the amount of damages, etc., with all convenient speed;** such proof to be made either orally before the said commissioner or by deposition in due course of usual and legal procedure applicable in such matters; * * * " (Emphasis ours). (R. 50).

The cases, decisions of this Honorable Court, cited by petitioners in support of their contention that the action of the Court of Appeals is in conflict with said decisions, clearly fail to sustain petitioners' contention. In the case of *Davis v. Schwartz,* 155 U. S. 631, one of the said cases cited by petitioners, this Honorable Court, in referring to its decision in the case of *Kimberly v. Arms,* 129 U. S. 512, also cited by petitioners, points out that in the case of *Kimberly v. Arms supra*:

> " * * * a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to

> the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the findings of a subordinate court. 'Its findings,' said the court, 'like those of an independent tribunal, are to be taken as presumptively correct, subject indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.' As the reference in this case was by consent to find the facts, we think the rule in Kimberly vs. Arms applies, and as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive. To same effect are Crawford vs. Neal, 144 U. S. 585, 596 (36: 552, 557); Furrer vs. Ferris, 145 U. S. 132 (36: 649)."

Aside from the facts as above stated, that the order of reference in this case was the usual reference, and not one by consent of the parties, as in *Kimberly v. Arms, supra,* the Court of Appeals, in referring to the Commissioner's report, at R. 448, in part says:

> " * * * He reviewed the evidence to some extent in making his report, but did not specifically find the facts as to any claim."

We will not extend this brief by referring to the many decisions of this Honorable Court, frequently cited by the lower courts, to the effect that an appeal in admiralty is a trial *de novo,* and as stated by this Honorable Court, in the case of *Brooklyn E. D. Terminal vs. U. S.,* 287 U. S. 170, at page 176:

> "In admiralty an appeal to the court of appeals is deemed to be a trial *de novo* (citing many cases).

> An assessment of damages may be corrected if erroneous in point of law, but also may be corrected if extravagant in fact."

This right in the appellate court is likewise recognized under the new Supreme Court Admiralty Rule 43½, which in part provides that the findings of a commissioner, while presumptively correct

> " * * * shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part, when the court in the exercise of its judgment, is fully satisfied that error has been committed:"

C.

The Court of Appeals, on this trial *de novo*, and after giving careful consideration to the evidence with respect to all of the claims in general, and special consideration to each claim in particular, unanimously fixed the amounts due petitioners in a sum which they deemed proper to cover their pecuniary damages (R. 447-455). A reference to the opinion of the Court of Appeals clearly discloses the care with which that Court considered the facts herein, and that the substantial awards in the amounts determined upon by them are supported by the facts, and fully compensate petitioners for the pecuniary loss sustained by them herein.

The Court of Appeals did not differ from the Commissioner and the District Court as to the law properly applicable thereto. This is clear by the statement of the Court of Appeals in referring to the Commissioner's report (R. 448), wherein it, in part said:

> "So far as he discussed it, the commissioner correctly interpreted the law. He reviewed the evidence to some extent in making his report but did

> not specifically find the facts as to any claim. It is not clearly shown what formula he used in determining the amount to be awarded."

The Court of Appeals, in a consideration of the evidence, and in speaking of the well settled law applicable in such cases, at R. 448, further said:

> "The law is well settled. The claimants are entitled to recover in admiralty, under the provisions of section 33 of the Merchant Marine Act of June 5, 1920 (T. 46 USCA §688), which incorporates the provisions of the Federal Employers' Liability Act (T. 45 USCA secs. 51, *et seq.*) by reference. Lindgren vs. U. S., 281 U. S. 38. There may be only one recovery by the personal representative of the deceased for the benefit of all the persons entitled to damages under the act. The measure of damages is compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. In estimating this the earning power of money must be considered and an amount determined, which, capitalized at a reasonable rate of interest, would yield annually the same income the person injured might have expected from the deceased, using the interest and part of the capital from year to year. To determine this amount standard tables prepared by actuaries may be used. Chesapeake & Ohio Ry. vs. Kelly, 241 U. S. 485."

Chesapeake & Ohio Ry. vs. Kelly, followed by the Court of Appeals, is also cited and relied upon by petitioners herein.

Likewise, in considering the law applicable in case of pecuniary loss to children, at R. 448, the Court of Appeals followed the language of this Honorable Court, and stated:

> "Pecuniary loss to be recovered may include damages, 'when the beneficiary is a child, for the loss of that care, counsel, training and education **which it might, under the evidence, have reasonably received from the parent,** and which can only be supplied by the service of another for compensation.' Michigan Central R. R. vs. Vreeland, 227 U. S. 59-71." (Emphasis ours).

This decision of this Honorable Court is also cited and relied upon by petitioners herein, but at page 19 of their brief petitioners contend that the Court of Appeals erroneously held "that the children had only a right of 'theoretical pecuniary recovery for the loss of the father's care and guidance'." That petitioners err in their aforesaid contention is clearly shown by reference to the opinion of the Court of Appeals, as that Court found that there was no evidence to support this alleged element of damage. The Court, in so finding said:

> " * * * Three of these claims were also for the benefit of minor children. There is nothing in the evidence, except the general statement of the widow that the father was devoted to his children and gave them his care and affection when at home, to show the pecuniary value of his services to the children or that another would of necessity have to be employed to furnish the same care." (R. 449).

And in apportioning the Fifteen Thousand Two Hundred Fifty Dollars ($15,250.00) awarded by the Court of Appeals to Sophia Brennan, Administratrix of the petitioner herein, between the mother and children, as the Court also did with respect to other claims herein where children were beneficiaries, the Court, in its opinion, said:

> "We consider that the apportionment of $1,000.00 to each of the children would be proper.

> This will be sufficient to include any theoretical pecuniary recovery for the loss of the father's care and guidance." (R. 451).

It will therefore be noted that there is no merit in petitioners' contention that the Court of Appeals erred in applying the law as to the children, as the Court of Appeals followed the well settled law, and declined to make any allowance to the children for loss of care, counsel and training, not because, as petitioners contend, "the children had only a right to theoretical pecuniary recovery", but because, as the Court found, such allowance was not sustained by the evidence.

D.

Petitioners herein complain of, and are seeking to have this Honorable Court review the action of the Court of Appeals in adopting the rate of interest at 6% in determining the present value of money, contending that there was no evidence to support it; and that the testimony of Mitchell, the Actuary, was undisputed and to the effect that 3½% was the reasonable rate.

In this statement petitioners err, as the record shows that Mitchell, the actuary referred to by petitioners, a witness produced in their behalf, testified that he knew that his Company, an insurance company, had made investments in mortgage loans at 5 and possibly 6% that were considered good, safe investments at the time (R. 238). W. T. Weatherall, Vice-President of a bank, who testified on behalf of respondent as to present value, testified that good, safe investments could be made in certain bonds at 5% (R. 338), and investments in stock at a higher rate. He also testified to investments in 1932 at from 7% to 10% (R. 337).

In this connection the Court of Appeals said:

> "The legal rate of interest in Texas is 10% per annum. Doubtless many well secured loans are made at that rate. United States bonds as a rule do not pay more than 3% but there are many state bonds and sound industrial securities that pay at least 6% per annum interest. Courts are not bound to adopt either the highest or the lowest rate of interest in determining the amount to be awarded." (R. 449).

The Court then referred to two of its prior decisions wherein it adopted 6% interest, to-wit: *Ramjak v. Austro-American S. S. Co.*, 186 F. 417, and *U. S. v. Boykin*, 49 F. (2d) 762.

On page 58 of the brief in support of the application for writs herein, petitioners urge that the Commissioner and both lower courts were required as a matter of law to determine the compensatory damages sustained in each case in accordance with this mathematical evidence as being the most accurate and trustworthy criterion. That such a contention is clearly contrary to the well settled law is shown by the following reference. In the case of *Coast Steamship Co. v. Brady*, 8 F. (2d) 16, the Court of Appeals for this Circuit in considering a charge to the jury involving the contention that the jury were required to adopt the mathematical calculation, and to fix absolutely the amount of loss of plaintiffs' earning capacity, stated that if the contention was sustained then the charge under the decision of the Supreme Court, in the case of *Vicksburg etc. Railroad Company v. Putnam*, 118 U. S. 545, was erroneous. At page 19 the Court of Appeals further says:

> " * * * The jury were not instructed that they were bound by the annuity table, but that they might consider it. As far as the record shows, defendants did not request any charge on the measure of damages. They could have submitted

explanatory charges calling to the attention of the jury the probability that plaintiff might not always have employment and that his earning capacity in his declining years might be less than at the time of his injury. The Court's charge required the jury to take into consideration all the evidence relating to plaintiff's health, habits, and occupation, and therefore charges to the effect just indicated would not have been contradictory or inconsistent with the charge which was given. * * * "

In the case at bar the Court of Appeals states that

"There is no mathematical formula for exactly determining the loss * * * ." (R. 449).

F.

That the Court of Appeals, in determining the measure of damages followed the well settled law is further shown by reference to their opinion, wherein they say:

"* * * The measure of damages is compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. In estimating this the earning power of money must be considered and an amount determined, which, capitalized at a reasonable rate of interest, would yield annually the same income the person injured might have expected from the deceased, using the interest and part of the capital from year to year. To determine this amount standard tables prepared by actuaries may be used. Chesapeake & Ohio Ry. v. Kelly, 241 U. S. 485." (R. 448).

Petitioners, in their petition and brief, also cite this decision of this Honorable Court. It is evident that petitioners do not differ with the Court of Appeals on the law, but merely as to what constitutes a reasonable rate of

interest in calculating present value, contending that an interest rate of 3½% would be reasonable, the Court of Appeals determining upon a 6% rate as reasonable.

G.

Petitioners herein complain of, and as grounds of review by this Honorable Court, contend that the Court of Appeals erred in their modification of the judgment of the lower Court in holding that interest thereon should run from date of final decree of the District Court, instead of from date of the Commissioner's report, as allowed by the District Court.

The report of the Commissioner to whom the District Judge, on motion of claimant, petitioner herein, referred this matter to ascertain the damages, and in accordance with the order of Court appointing him "to report thereon to this Court with the evidence taken before him with respect to the various claims for death and with his opinion in addition as respects the amount of the damages, etc." duly complied with this order and filed his report. To this report petitioners and respondent both filed exceptions, and on a hearing the District Court modified the Commissioner's report. The Court of Appeals in this trial *de novo* modified the lower court's opinion as to the amount of damages allowed, and also determined that interest should run from date of final decree in the district court. On this question the Court of Appeals said:

> "The judgment awarded interest to the claimant at the rate of 6% per annum from February 28, 1935, the date of the filing of the commissioner's report. The report merely recommended the amounts to be awarded and did not fix the liability of the company. The act does not provide for interest before the damages are determined. Cortes vs. Baltimore Insular Line, 66 F.

(2d) 526. In admiralty the allowance of interest is discretionary with the court. In this case interest should be allowed at the rate of 6% per annum from July 18, 1935, the date the decree was entered in the District Court." (R. 455).

In the case of *Cortes v. Baltimore Insular Line, supra,* cited by the Court of Appeals, it is held by the Court of Appeals for the Second Circuit that neither the Jones Act or the Employers' Liability Act permits the awarding of interest on damages before the damages are judicially ascertained; that Court cited cases in support of this holding.

Petitioners do not contend that there is any conflict between the various Circuit Courts of Appeals on this question, and do not cite any authorities to support their contention that the Court of Appeals erred in holding that interest on damages should run from the date of the final decree in the District Court.

PART II. CAUSE NO. 460

This cause came before the Court of Appeals on a cross appeal taken by petitioner herein from the final decree of the District Court, affirmed by the Court of Appeals, disallowing the claim filed by Mrs. Jennie Royakers as administratrix to recover damages for the death of her son, Edward C. Van Beeck who was second mate on the "Coney". With respect to this claim it was stipulated that the deceased left surviving him his mother and a brother, age 34. After filing the claim his mother died, in July, 1931, before the award had been recommended by the Commissioner. The brother, Charles Van Beeck, qualified as administrator of the estate of his brother, and was substituted in place of his mother, the former administratrix.

Cross Appellant and petitioner herein, contends that judgment should have been granted for the amount recommended by the Commissioner. The Court of Appeals, in affirming the decree of the district Court and in disallowing the award of Seven Hundred Dollars ($700.00), in its opinion said:

> "The statute (T. 45 U. S. C. A. §51) creates three classes of beneficiaries, (1) the surviving widow or husband and children of the employee, (2) the employee's parents and (3) the dependent next of kin of the employee. Each class excludes those following, in the order named, and non-dependent collaterals are not entitled to recover. Before the passage of the Merchant Marine Act there could be no recovery for damages for the death of a sailor occurring on the high seas. Nor could there be any recovery for death of a common law. In Martin's Administrator vs. Blto. & Ohio R. R., 151 U. S. 673-703, an action was brought by Martin to recover damages for personal injuries to himself. A verdict was directed for defendant. Pending an appeal, Martin died and his administrator was substituted. On suggestion of his death, in the Supreme Court, it was held that the action abated by the death of the injured party, under the law of Virginia, where the action was brought, and that the administrator had no right to maintain the action. In Chicago, Burlington & Quincy R. R. Co. vs. Wells-Dickey Trust Co., 275 U. S. 161, it was held that the liability is to one of the three classes named in the act and not to the several classes collectively; and if the person entitled to recover at the time of the employee's death dies before a recovery of the compensation, the cause of action dies also.
>
> "There is no doubt that the cause of action abated with the death of the mother, who at the time of her son's death was the sole beneficiary

> entitled to recover, to the exclusion of all others. It is clear there could be no recovery on this claim." (R. 454).

This Honorable Court, in the case of *Chicago Burlington-Quincy R. R. v. Wells-Dickey Trust Company*, cited and relied upon by the Court of Appeals herein in speaking of the act in question (T. 45 U.S.C.A. §51) at page 163 said:

> "The contention is that if one entitled at the death of the employee to the compensation dies thereafter before a recovery, the action may be brought on behalf of the class next in line. There is no basis in the act for such a shifting of the beneficiary. The statute does not provide for a life interest in one, with remainder over to others in the line of distribution, nor does it provide for vesting the right to compensation in the one, with a conditional limitation to another, in case the one entitled at the death happens to die thereafter without having secured recovery."

It is clear therefore, that the Court of Appeals did not misconstrue but properly followed the law as laid down by this Honorable Court.

Notwithstanding this clear declaration of the law petitioners, at page 16 of their petition, in referring to the action of both lower Courts in disallowing this claim, say:

> " * * * Both courts base their erroneous conclusion upon their misconstruction of the case of Chicago B. & Q. Ry. Co. vs. Wells-Dickey Trust Co., 275 U. S. 161, 48 S. Ct. 73."

And at page 17 further say that

> "Such holding of the Circuit Court of Appeals with respect to the Van Beeck claim is in conflict with decisions of another Circuit Court of Appeals and of a District Court; and said Court has thus 'decided an important question of general law in a way probably untenable and in conflict with the weight of authority;' as shown by the following decisions: Union Steamboat Co. v. Chaffins' Administrators (C. C. A. 7) 204 F. 417; The City of Rome (D. C. N. Y.) 48 F. (2d) 341-342; Sider v. General Electric Co., 238 N. Y. 64, 143 N. E. 792, 34 A. L. R. 156."

There is absolutely no conflict between the instant case and those cited above by petitioner. The case of *Union Steamboat Co. v. Chaffins' Administrator, supra,* was decided under the death statute of Illinois. The case of *Sider v. General Electric Co., supra,* was decided under the death statute of New York. The case of *The City of Rome* was decided under the Death on the High Seas Act, 46 U. S. C. A. Sec. 761, an act not similar to the one involved in the instant case. Further, in *The City of Rome* case the facts were different than involved herein. In that case, a decree as to liability was rendered February 26th, 1928. See same case reported in 24 F. (2d) 729. The claimant was then living, and she became vested with a judgment in her favor, a judgment which decreed a recovery in her favor. That, as shown by the report of the Commissioner to whom the matter was referred to ascertain the amount of the damages, the claimant died about seven months after this decree as to liability. This report is set forth in the report of the case in 48 F. (2d) 333, and at page 341 this claim is discussed. This authority, we feel, needs no further comment, as the facts are not analogous to the claim of the mother of the deceased herein, the designated beneficiary, who died long before the decree as to liability was rendered herein.

We respectfully submit that in disallowing this claim both the lower courts followed the well settled law applicable in such cases.

CONCLUSION

We respectfully submit that in Cause No. 459 the writ should be denied as the Court of Appeals gave careful consideration to each of the claims herein, and the awards as determined by the Court are in a sum which, from the evidence herein, fully compensate petitioners for the pecuniary damages sustained. The decision of the Court of Appeals herein followed the well settled law, as settled by this Honorable Court, and arrived at awards that the Court considered just and proper after considering the facts involved as to each claim.

That in Cause No. 460, the writ should be denied, as the decision complained of by both lower Courts is in harmony with the decisions of this Honorable Court on the question of the law applicable to the facts with respect thereto.

Respectfully submitted,

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